
(2000) 07 P&H CK 0142

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 16396 of 1999

S.R. Udyog

APPELLANT

Vs

State of Haryana and others

RESPONDENT

Date of Decision : 05-07-2000

Acts Referred:

Haryana General Sales Tax Act, 1973 — Section 39, 39(1), 39(5), 40

Citation : (2000) 07 P&H CK 0142

Hon'ble Judges : Nirmal Singh, J;G.S. Singhvi, J

Bench : Division Bench

Advocate : K.L. Goyal and Shatin Goyal, for the Appellant; Jaswant Singh, for the Respondent

Judgement

G.S. Singhvi, J.—Whether the appellate authority can, while entertaining an appeal filed u/s 39(1) of the Haryana General Sales Tax Act, 1973 (for short, "the Act") impose the condition of furnishing of surety bond, is the question which arises for determination by this Court in this petition filed for partial quashing of the order dated March 5, 1998 passed by the Joint Excise and Taxation Commissioner (Appeals), Ambala, and the orders dated July 22, 1998 and July 14, 1999 passed by the Sales Tax Tribunal, Haryana (hereinafter described as "the Tribunal").

2. The facts necessary for deciding the aforementioned question are that by an order dated December 27, 1995 (annexure P2), the Excise and Taxation Officer-cum-Assessing Authority, Yamuna Nagar, held the petitioner liable to pay Rs. 50,522 as tax for the year 1989-90. The petitioner challenged that order by filing an appeal u/s 39(1) of the Act. Along with the appeal, he filed an application under proviso to section 39(5) of the Act for entertaining the appeal without pre-deposit of the assessed amount. The Joint Excise and Taxation Commissioner (Appeals), Ambala, accepted its request subject to the condition of furnishing surety bond to the satisfaction of the assessing officer. This did not satisfy the petitioner and, therefore, it filed an appeal before the Tribunal which was

dismissed on July 22, 1998. The review petition filed by the petitioner was also dismissed on July 14, 1999.

3. Shri K. L. Goyal argued that the condition of furnishing surety bond imposed by the appellate authority should be declared void because the first part of the proviso to section 39(5) of the Act does not envisage imposition of such condition. He submitted that such condition can be imposed only under second part of the proviso at the stage of consideration of request for stay of the recovery of tax and as the appellate authority was not considering the issue of stay, it could not have imposed the condition of furnishing surety bond. Learned counsel argued that in the absence of any statutory embodiment to this effect, the condition imposed by the appellate authority, which has been upheld by the Tribunal, should be invalidated and the former be directed to hear the appeal without insisting on compliance of the impugned condition. He further argued that the Tribunal has gravely erred in holding that the condition of furnishing surety bond is mandatory. On the other hand learned Deputy Advocate-General argued that the condition of furnishing surety bond cannot be termed as ultra vires to the powers of the appellate authority and in any case the court should not interfere with the impugned orders because no prejudice has been caused to the petitioner by incorporation of the said condition.

4. We have considered the respective submissions. Sub-sections (1), (2) and (5) of section 39 of the Act, which have bearing on the decision of this case, read as under :

"39. Appeal. - (1) An appeal from every original order, including an order u/s 40, passed under this Act or the Rules made thereunder shall lie, -

(a) if the order is made by an assessing authority, officer in-charge of a check-post or barrier or an officer below the rank of Deputy Excise and Taxation Commissioner, to the Deputy Excise and Taxation Commissioner or such other officer as the State Government, may by notification, appoint;

(b) if the order is made by the Deputy Excise and Taxation Commissioner or any other officer not below the rank of a Deputy Excise and Taxation Commissioner to the Commissioner or such other officer as the State Government, may by notification, appoint;

(c) if the order is made by the Commissioner, to the Tribunal.

(2) An order passed in appeal by the Deputy Excise and Taxation Commissioner or the officer appointed by the State Government under clause (a) of sub-section (1) or by the Commissioner or the officer appointed by the State Government under clause (b) of that sub-section shall be further appealable to the Tribunal.

(3) (4) (5) No appeal shall be entertained unless it is filed within sixty days from the date of the order appealed against and the appellate authority is satisfied that the amount of tax assessed, and the penalty and interest, if any, recoverable from the person has

been paid :

Provided that the said authority, if satisfied that the person is unable to pay the whole of the amount of tax assessed, or the penalty imposed, or the interest due, he may, if the amount of tax or interest admitted by the appellant to be due has been paid, for reasons to be recorded in writing, entertain the appeal and may stay that recovery of the balance amount subject to the furnishing of a bank guarantee or adequate security in the prescribed manner to the satisfaction of the appellate authority :

Provided further that in the case of an appeal against any order, which has to be communicated by the appropriate authority to the appellant, the period of sixty days shall commence from the date of receipt of the copy of the order by the appellant and in the case of an appeal against any other order made under this Act, the time spent in obtaining the certified copy of the order shall be excluded in computing the period of sixty days."

5. An analysis of the provisions quoted above shows that ordinarily an appeal filed u/s 39(1) of the Act cannot be entertained unless the amount of tax assessed and the penalty and interest, if any, imposed has been paid, but under first part of the proviso to sub-section (5) of section 39, the appellate authority can entertain the appeal without insisting on deposit of the amount of tax, etc., if it is satisfied that the appellant is unable to pay whole of the amount of tax and/or penalty and/or interest. Exercise of this power is subject to the condition that the appellant has paid the admitted amount of tax and interest and the appellate authority has recorded reasons in writing for entertaining the appeal without insisting on deposit of whole amount of tax, etc. The second part of the proviso empowers the appellate authority to stay the recovery of the balance amount subject to the furnishing of a bank guarantee or adequate surety in the prescribed manner.

6. In our opinion, the appellate authority can exercise power under first part of the proviso to section 39(5) only if it is satisfied that the appellant is unable to pay the whole amount of tax, etc., and this satisfaction must be reflected in the form of reasons to be recorded in writing. The argument of Shri Goyal that the condition of furnishing adequate surety cannot be imposed in an order passed under the first part of the proviso is based on a misconceived assumption that the language of that part of the proviso is restrictive in nature. However, on a consideration of the plain language of proviso to section 39(5), we are convinced that even though it does not expressly provide for imposition of condition of furnishing surety bond, there is nothing in it from which it can be inferred that the appellate authority cannot impose appropriate condition while entertaining the appeal without insisting on pre-deposit of tax, etc. The contrast in the language used in the two parts of the proviso to which Shri Goyal has drawn our attention does not, in our opinion, dilute the inherent nature of the power vested in the appellate authority to impose appropriate condition while granting exemption to the appellant from depositing the amount of tax assessed by the

competent authority.

7. De hors the above conclusion, we are inclined to agree with Shri Goyal that the view taken by the Tribunal about the requirement of furnishing bank guarantee or adequate security is not borne out from the language of first proviso to section 39(5) of the Act. It is one thing to say that the appellate authority can impose appropriate condition for entertaining an appeal without insisting on deposit of tax, etc., and it is altogether different thing to say that the appellate authority must insist on furnishing bank guarantee, etc., in all cases. In our view, the appellate authority has to apply its judicious discretion keeping in view the facts of each case and no straight-jacket formula can be laid down on the issue of furnishing surety bond.

8. Faced with this, Shri Goyal submitted that before imposing the condition of furnishing surety bond, the appellate authority should have given an opportunity to the petitioner to satisfy that it is not in a position to do that. He submitted that if the petitioner had been pre-informed about the proposed imposition of condition embodied in the order passed by the appellate authority, its representative could have produced evidence to establish its inability even to furnish the surety bond. We find some substance in the argument of the learned counsel that before imposing the condition of furnishing surety bond, the appellate authority should have given an opportunity to the petitioner to adduce evidence about its inability to comply with this condition and its failure to do so has resulted in violation of the principles of natural justice.

9. Hence, the writ petition is allowed. Orders, annexures P5, P7 and P9 are quashed with the direction to the Joint Excise and Taxation Commissioner (Appeals), Ambala to re-consider the application filed by the petitioner under proviso to section 39(5) of the Act and pass appropriate order in accordance with law. This shall be done within two months of the receipt of the copy of this order.

10. Before parting with the case, we consider it necessary to observe that the order, annexure P5, passed by the appellate authority is extremely cryptic, arbitrary and is totally devoid of reasons. On the face of it, the order discloses total non-application of mind by the concerned authority to the statutory conditions enshrined in proviso to section 39(5) of the Act and we hope that while passing fresh order, the officer concerned will keep in mind that power under the proviso can be exercised only if the appellate authority is satisfied that the appellant is incapable of depositing the amount of tax, penalty and interest.

11. Writ petition allowed.